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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

(1)

No. 346

MORRIS B. SACHS, T. C. WITT, GIZELLA WITT, ANNA CHRISTENSEN, PETER VISSER AND WILLIAM STERNBERG,

Petitioners,

vs.

THE OHIO NATIONAL LIFE INSURANCE COMPANY, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN W. CRAGUN,
Counsel for Petitioner.

LAWRENCE J. WEST,
SIDNEY W. MANDEL,
MILLARD C. EISEMAN,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 346

MORRIS B. SACHS, T. C. WITT, GIZELLA WITT, ANNA CHRISTENSEN, PETER VISSER AND WILLIAM STERNBERG,

Petitioners,

vs.

THE OHIO NATIONAL LIFE INSURANCE COMPANY, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Morris B. Sachs, T. C. Witt, Gizella Witt, Anna Christensen, Peter Visser and William Sternberg, respectfully pray that a writ of certiorari issue in the above-captioned case to review the judgment of the United

States Circuit Court of Appeals for the Seventh Circuit rendered therein March 21, 1945.

Opinions Below

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals is reported in 148 F. 2d 128, and appears in the record at R. 638.

Earlier opinions written in previous phases of this case appear as follows: *Sachs* v. *Ohio Nat. L. Ins. Co.*, 116 F. 2d 113, cert. denied 312 U. S. 706; *Sachs* v. *Ohio Nat. L. Ins. Co.*, 44 F. Supp. 552, reversed 131 F. 2d 134.

Jurisdiction

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended (c. 229, 43 Stat. 936, 938, as amended; 28 U. S. C. § 347).

The judgment of the Circuit Court of Appeals was entered March 21, 1945 (R. 647). The time within which this petition might be filed was extended by order of Mr. Justice Murphy until August 21, 1945 (R. 652).

Questions Presented

1. Whether the evidence underlying findings of fact by a master and District Court may be examined only for the purpose of ascertaining if the record affords *any rational* basis in support of the findings.

2. Whether the court below has set at naught the constitutional and statutory super-added liability of owners of bank stock under the law of Illinois.

3. Whether petitioners are third-party beneficiaries of respondent's contract to pay the liabilities of petitioners' debtor, and whether, therefore, petitioners have standing, under the law of Illinois, to sue.

Statutes Involved

The Constitution of Illinois, Art. XI, § 6, provides:

> Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

The Illinois statutes provide (c. 16½, Smith Hurd Ill. Ann. Stat. § 6):

> Every stockholder in any bank or banking association organized under the provisions of this Act shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder. It is hereby made the duty of the president and cashier, within thirty days after organization, to file in the office of the recorder of deeds of the county in which such bank is located, a certified list of all the original stockholders, giving the number of shares of stock held by each, and thereafter a certificate of all transfer of stock, not later than ten days after such transfer. No transfer of stock shall operate as a release of liability provided in this section.

Statement.

In an earlier phase this case was presented to the Court on petition for writ of certiorari by respondent, *Ohio Nat. L. Ins. Co.* v. *Sachs, et al.*, certiorari denied 312 U. S. 706, No. 787, O. T. 1940. The case involves a suit by creditors of the Roseland State Savings Bank of Illinois to recover stockholders' super-added liability imposed by the Constitution of the State of Illinois and the Illinois stat-

ute under which the bank was incorporated. Amongst the defendants to the suit, originally instituted in the Illinois state court, was American Old Line Life Insurance Company, which owned 1003 shares of the stock of Roseland State Savings Bank, the stockholders' liability on which amounted to $100,300 (R. 606-7). Respondent was added as a defendant by supplemental complaint filed in July, 1935, the supplemental complaint setting up that respondent was liable for the stock liability of American Old Line Insurance Company by reason of an agreement to assume all the liabilities of the latter. Respondent removed the cause to the District Court of the United States for the Northern District of Illinois as a separable controversy. That court sustained a motion for summary judgment on the ground that the assumption of the liability for the bank stock was *ultra vires*. The judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit, 116 F. 2d 113, and this Court denied certiorari, 312 U. S. 706, No. 787, O. T. 1940. The Circuit Court of Appeals ruled not only that the agreement to assume liability was not *ultra vires* but that the re-insurance agreement was not void for non-compliance with the state statutes governing re-insurance, whereby the liability for the bank stock was claimed to have been assumed.

On remand, the district court again sustained a motion for summary judgment on the ground that the state court had been without jurisdiction to entertain the supplemental complaint against respondent. Petitioners treated this as a non-suit under the Illinois statute, since it did not go to the merits of their claim, and filed a new and amended complaint in the same cause. Again the district court dismissed the complaint on motion for summary judgment on the ground that the statute of limitations had run. The Circuit Court of Appeals again reversed, 131 F. 2d 134,

holding that the earlier judgment of dismissal had constituted a non-suit, thus tolling the statute of limitations under the Illinois law.

Upon remand from that reversal, respondent urged that petitioners were not entitled to sue as third-party beneficiaries of the agreement of re-insurance between respondent and American Old Line Insurance Company; that under the terms of the agreement, respondent did not assume the stockholders' liability of American Old Line.

The cause was referred to a master who reported (R. 605) that respondent had relied upon the books of American Old Line in entering into the re-insurance agreement; that such books and records did not show the liability on the bank stock; and that the master was not impressed by the testimony offered to show that the item was carried on the books of American Old Line as a "contingency reserve" (R. 609-610). The master quoted certain opinions of this Court and one of the Illinois Supreme Court respecting the right of a third person to sue for breach of a contract between two others, and concluded (R. 611), that in his opinion petitioners cannot maintain this suit. He also held (R. 611) that the provisions of the re-insurance agreement that respondent shall assume and agree to discharge all of the contracts [the master here omits reference to the assumption of all liabilities] of American Old Line was not intended to include stockholders' liability; and that it is not necessary to go beyond the terms of the re-insurance agreement itself or to rely upon the oral testimony as to the intent of the parties in order to determine the intent of the parties (R. 611). While the respondent agreed to take the stock along with other assets of the American Old Line, nevertheless the stock was actually retained by American Old Line and its value credited

on the purchase price at the specific request of American Old Line and always stood on the books of the bank and of American Old Line as stock owned by the latter (R. 612). Assuming that respondent knew that American Old Line owned the stock and that as a matter of law it was charged with knowledge of the stockholders' liability, still, the master held, the respondent did not assume any stockholders' liability (R. 612).

The master's report was adopted by District Court and the complaint dismissed for want of equity (R. 622).

The Circuit Court of Appeals affirmed (R. 638). It held that both of the reasons ascribed by the master were the proper answers to petitioners' case: (1) plaintiffs, not being parties to the re-insurance agreement, could not maintain an action thereon as third-party beneficiaries; and (2) the parties to the re-insurance agreement did not intend that respondent should assume the bank stockholders' liability. Actually, in the course of the court's somewhat confused opinion, it develops that these two reasons amount to one and the same thing: that the finding that the parties did not intend that respondent should assume the bank stockholders' liability results that there is no liability to petitioners assumed by respondent upon which petitioners can sue as third-party beneficiaries. The court cites the Illinois law generally with respect to third-party suits on contracts. It concludes that before recovery can be had by a third-party beneficiary it must be shown that the contract was made for his direct benefit or primarily for his benefit, and holds that the agreement was not intended for the benefit of plaintiffs and other creditors of the bank (R. 643). It felt that the term "liabilities" as used in the contract meant only liabilities upon contracts of insurance written by American Old Line, and not all the liabilities of that company (R. 644). In particular, the court held that "inasmuch as both the Master

and the District Court have found against the plaintiffs on this issue, * * * we examine the facts with a view of ascertaining if the record affords *any rational basis* in support of such finding. If so, the finding of the lower court must be accepted by us'' (R. 641).

Specification of Errors to Be Urged

1. The court erred in holding that it must affirm the the findings of the district court if there is ''any rational basis'' in the evidence to sustain such findings.

2. The court erred in holding that petitioners do not have status or standing under Illinois law to maintain this action as third-party beneficiaries.

3. The court erred in holding that by the contract of re-insurance between respondent and American Old Line Insurance Company, respondent did not assume the outstanding liability on stock of the Roseland State Savings Bank.

4. The court erred in affirming the judgment of the district court.

Reasons for Granting the Writ

1. The court below has decided a question of federal law in conflict with the decisions of other circuit courts of appeals, in holding that a decision of a district court in a non-jury case wherein there was no substantial conflict of evidence must be affirmed as to questions of fact if there is ''any rational basis'' to support the findings of fact. Considering the capacity of the human mind (even the judicial mind) to rationalize, to deny review of ultimate facts where there is *any rational* basis to support them, instead of to review the facts to see if there is *substantial* evidence to support them, or to see if they are against the clear weight

of the evidence, or were induced by the application of a wrong principle of law, means that litigants are denied entirely the right to the review of findings of a district court.

This was commenced as a suit in equity (R. 2). The former rule as to review of findings of fact by an equity court is now embodied in the Rules of Civil Procedure, Rule 52(a),[1] as to all cases, legal or equitable; and Rule 52(a) presents no change from that in the former equity practice. *Kuhn* v. *Princess Lida of Thurn & Taxis* (C. C. A. 3d, 1941), 119 F. 2d 704; *Stonega Coke & Coal Co.* v. *Price* (C. C. A. 4th, 1939), 106 F. 2d 411, 417, cert. denied 308 U. S. 618; *Guilford Constr. Co.* v. *Biggs* (C. C. A. 4th, 1939), 102 F. 2d 46; *Katz Underwear Co.* v. *United States* (C. C. A. 3d, 1942), 127 F. 2d 965, cert. denied 317 U. S. 655; *Aetna L. Ins. Co.* v. *Kepler* (C. C. A. 8th, 1941), 116 F. 2d 1.

The decision of the court below holding it would examine the facts only to ascertain if the record affords *any rational basis* in support of the findings conflicts with the following cases:

Beckley Nat. Bank v. *Boone* (C. C. A. 4th, 1940), 115 F. 2d 513, where the court of appeals reversed on the facts a

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[1] Rule 52 (Findings by the Court) provides:

"(a) *Effect.* In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

The notes of the Advisory Committee on this rule call attention to the fact that this substantially continues Equity Rule 70½, in effect prior to the adoption of the new rules, citing the cases as to the scope of review under modern federal equity practice.

decision of the district court which had affirmed the findings made by a master. The court, in reviewing the facts, stated: "In making this investigation, we must adhere to the rule that an appellate court will not disturb the findings of a special master, confirmed by a district judge, upon a disputed question of fact, unless a very plain mistake has been made. [Citing cases.] But as this court has said previously, the findings of a special master as approved by the judge below, though entitled to weight, are persuasive only and not controlling. The review in this court is a real review and not a perfunctory approval. [Citing cases.]"

Aetna L. Ins. Co. v. *Kepler* (C. C. A. 8th, 1941), 116 F. 2d 1, where the court of appeals reversed on matter of fact, stating:

> "The effect of Rule 52(a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.
>
> "This Court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals.
>
> "The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this Court."

Fleming v. *Palmer* (C. C. A. 1st, 1941), 123 F. 2d 749, cert. denied 316 U. S. 662, where the District Court of Puerto Rico had held that a cooperative, which had taken over the business of an employer, was voluntarily formed and that there was no employer-employee relationship within the meaning of the Fair Labor Standards Act, such as had formerly existed. The only substantial questions on the

appeal were questions of fact. The circuit court of appeals reversed on these issues of fact, stating:

> "The district judge's finding that the business is controlled by the workers and not by the Palmers must stand unless it is clearly erroneous, due regard being given to the opportunity of the trial court to judge the credibility of witnesses. Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence. Aetna Life Ins. Co. v. Kepler, 8 Cir., 1941, 116 F. 2d 1; State Farm Mutual Automobile Ins. Co. v. Bonacci, 8 Cir., 1940, 111 F. 2d 412; Manning v. Gagne, 1 Cir., 1939, 108 F. 2d 718 * * * In determining whether the finding was correct, we shall examine documentary evidence which we are as competent to consider as the trial court, testimony on which there is no conflict, and for the most part only the testimony of Palmer and Soltero, so that the element of credibility will not be seriously involved. * * *
>
> "We have been forced to conclude that the district judge's finding that the workers and not the Palmers controlled the business and this cooperative is against the clear weight of the testimony and must be set aside."

Sears, Roebuck & Co. v. *Talge* (C. C. A. 8th, 1944), 140 F. 2d 395, where the court, though recognizing that it could not reverse a finding of fact unless clearly erroneous (Rule 52[a]), nevertheless reversed—holding that a finding is clearly erroneous when it is not supported by substantial evidence, is contrary to the clear weight of the evidence, or is arrived at by the application of a wrong principle of law (citing cases). Compare *Gasifier Mfg. Co.* v. *General Motors Corp.* (C. C. A. 8th, 1943), 138 F. 2d 197, 199.

Also *State Farm Mut. Auto. Ins. Co.* v. *Bonacci* (C. C. A. 8th, 1940), 111 F. 2d 412; *United States* v. *Armature Re-*

winding Co. (C. C. A. 8th, 1942), 124 F. 2d 589; *Kuhn* v. *Princess Lida of Thurn & Taxis* (C. C. A. 3d, 1941), 119 F. 2d 704.

This Court has recently both approved the finding of a circuit court of appeals contrary to the findings of fact of a district court, even though there were no direct evidence to sustain the circuit court's finding, and has refused to modify findings of the trial court, unreversed by the circuit court of appeals, where the findings were supported by *substantial* evidence. *Muschany* v. *United States*, 324 U. S. 49, 56, 57.

Formerly, the court below itself accorded with this view of all the other courts which have passed on the question; and its statement in *In re Chicago & N. W. R. Co.* (C. C. A. 7th, 1940), 110 F. 2d 425, might well have been applied in this case:

> "In the instant case the bulk of the record stands on documentary evidence. Although some oral evidence was adduced, it is not conflicting nor does it present a question of credibility of the storyteller. The facts are not in dispute, and in such situations the legal deductions and conclusions of law drawn by the District Court, while worthy of great consideration, are not binding on this court. Nor are the findings conclusive in this court, unless supported by substantial evidence. See Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723c.

Compare *Campana Corp.* v. *Harrison* (C. C. A. 7th, 1940), 114 F. 2d 400; *Himmel Bros. Co.* v. *Sherrick Corp.* (C. C. A. 7th, 1941), 122 F. 2d 740, 742.

The application of this new any-rational-basis rule has worked an injustice in the present case. The bank-stockholders' liability attaching to the stock of Illinois banks was so important to the people of Illinois that it was made, and still stands, a requirement of the Illinois Constitution. Art XI, § 6. It is also set forth in the Illinois statutes.

It is a continuing liability and does not attach merely to ownership of the stock. Unlike the former liability on the stocks of national banks, the liability is not avoided by selling or otherwise disposing of the stock, but continues as to any given stockholder without limitation of time for all deposits made during the time a stockholder owned the stock. *Sanders* v. *Merchants St. Bank of Centralia* (1932), 349 Ill. 547, 182 N. E. 897; *Golden* v. *Cervenka* (1917), 278 Ill. 409, 116 N. E. 273; *Babka Plastering Co.* v. *City State Bank of Chicago* (1931), 264 Ill. App. 142.

The contract of respondent with American Old Line Life Insurance Company must be considered in the light of this peremptory policy of the State of Illinois. That contract, entitled "Re-Insurance Agreement," R. 36, entered into on November 19, 1930, provided that respondent should take from American Old Line "all of its contracts, assets, and property of every kind and nature, including all policy contracts in force" (par. 1). Conversely, it provided that respondent "shall assume and agree to *discharge all of the contracts*, including the renewal commission contract with H. W. Kingery, *and liabilities of the Insurer* [American Old Line], including the net reserve," and to pay the purchase price. In addition to the assumption of such contracts and liabilities, it was provided that corporation stocks owned by American Old Line and certain other assets should be transferred by respondent to American Old Line as part of the purchase price (par. 2). The agreement was to be effective only upon approval and ratification by the directors of each company and by the insurance officials of Illinois and Ohio. The approval of the "re-insurance agreement" was ratified by the board of directors of respondent, R. 434; by the board of directors of American Old Line, R. 539, 545; by the Director of Insurance of Illinois (January 3, 1931, R. 423); and by the Superintendent of Insurance of Ohio (December 30,

1930, R. 423-424). Up to this point,[2] therefore, there can be no question from the documentary evidence adduced but that respondent had agreed to assume all the liabilities of American Old Line as a part of the purchase price. And in the light of the plain provisions of the law of Illinois, the assumption of the continuing liability on the bank stock cannot be taken other than as a valuable element in the transfer. Respondent itself, in requesting the transfer to it of assets of American Old Line held by the Superintendent of Insurance of Illinois, recognized that under the contract "we assumed all of their liabilities and took title to all of their assets." R. 450.

In the light of the plain undertaking of respondent thus proved by documentary evidence, substantially the only testimony which might show that the agreement did not mean what it said was that the subject of bank-stock liability was not discussed during negotiation of the contract, and that the person negotiating the contract for American Old Line subjectively "did not intend" that respondent should assume that particular liability. R. 324-5. While testimony of such subjective intention in negotiating a contract is ordinarily ruled incompetent to vary the terms of the written agreement, at the same time doubtless it does constitute "any rational basis" for holding that the intention of the parties is different from their express, written agreement. But under the ordinary rule with respect to review of findings of a district court or master, the finding here that the parties to the re-insurance agreement "did not contemplate the claim herein sought to be enforced" (R. 611, finding 21) would be promptly

[2] As a matter of fact, this documentary evidence, not in dispute, was regarded by the master, Finding 21, R. 611, as sufficient to consider in determining the case as a matter of law, without recourse to oral testimony as to the intent of the parties. Had that view been adhered to by the court below, instead of its resorting to the "any-rational-basis" rule, the judgment should have been reversed on well-established principles of law.

reversed as not based upon substantial evidence, as being contrary to the clear weight of the evidence, or as induced by the application of a wrong principle of law. For the court below to look merely for "any rational basis" to support the findings under review, has resulted in a contradiction by the federal courts of the established policy of the State of Illinois to affix a continuing, independent liability on the ownership of stock in state banks.

2. The court below has decided a question of local law in conflict with the decisions of the Illinois state courts. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

The question whether, as a matter of law, the contract whereby respondent undertook to assume all the liabilities of American Old Line Life Insurance Company, entitles third-party creditors of American Old Line to sue respondent directly on the contract is a matter of state law purely in this situation. *Id.; Mutual Life Co.* v. *Johnson,* 293 U. S. 335, 339. The master relied primarily on the decisions of this Court as to the right of a third person to sue on a contract between other parties (R. 610-611). The court below quoted generally from the Illinois cases for the proposition that a third person could sue on a contract if the contract were one made for his benefit, directly or primarily (R. 640). But the court below did not examine the Illinois law to see how it would govern the present situation.

The Illinois law leaves no doubt that petitioners are entitled to sue respondent on its contract agreeing to assume "all * * * liabilities" of American Old Line. As pointed out above, this bank-stock liability of American Old Line was a continuing liability under the laws of Illinois; and it is a direct liability, an "individual and personal" liability, from the stockholder to all persons becoming creditors of the bank during the time the stockholder held the stock. *Golden* v. *Cervenka,* 278 Ill. 409,

116 N. E. 273; *Sanders* v. *Merchants St. Bank of Centralia* (1932), 349 Ill. 547, 556, 182 N. E. 897. Even if the liability were but a contingent liability, to pay in the event the bank failed, still the Illinois law recognizes the right of a creditor upon the happening of the contingency, to sue one contracting to assume the contingent liability. *Carson Pirie Scott & Co.* v. *Parrett* (1931), 346 Ill. 252, 178 N. E. 498, 81 A. L. R. 1262.

Whether petitioners were specifically named as persons for whose benefit the contract was made is completely irrelevant under the Illinois law. They are nonetheless persons entitled to sue on the contract though not named in it. *Novosk* v. *Reznick* (1944), 323 Ill. App. 544, 56 N. E. 2d 318. Although failure to particularize the liabilities seems to have influenced the court below, the failure specifically to mention any particular creditor was unnecessary, where the agreement was to assume *all* liabilities. The question is whether American Old Line had a liability as to this stock—a question as to which the state law leaves no doubt.

It is plain, therefore, that the removal of this cause from the state to the federal courts has resulted in the federal courts reaching a result exactly contrary to that which the state courts would have reached—the very evil at which *Erie R. Co.* v. *Tompkins* was addressed.

Conclusion

The writ should be granted.

Respectfully submitted,

JOHN W. CRAGUN,
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SIDNEY W. MANDEL,
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MORRIS B. SACHS, T. C. WITT, GIZELLA WITT, ANNA CHRISTENSEN, PETER VISSER AND WILLIAM STERNBERG,

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THE OHIO NATIONAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Want of jurisdiction should first be noted.

Objection to Jurisdiction.

This court is without jurisdiction to issue a writ of certiorari because no application therefor was made within the time required by statute (28 U. S. C. A., § 350).

The three months allowed for making such application

expired June 21, 1945 (R. 647). On June 19, 1945, an order was entered purporting to extend the time for filing the petition to and including August 21, 1945 (R. 652)—which was 63 days after the order was entered and 61 days after the time for making application for the writ had expired.

The only extension authorized is one "not exceeding 60 days" (28 U. S. C. A., §350). The attempted extension violated this statutory limitation, transcended the power granted, and was void. See 4 C. J. S. 930, § 458; *Connecticut M. & T. Co.* v. *Di Francesco,* 112 Conn. 673, 675, 151 Atl. 491. The late filing of the petition on August 20 did not give this court jurisdiction. *Monks* v. *Lee,* 317 U. S. 590, 87 L. ed. 483; *Cresswell* v. *Tillinghast,* 286 U. S. 560, 76 L. ed. 1293.

No Statutes Are Involved.

This was a suit on a contract between two private corporations and involved the construction and application of that contract. The provisions of the Illinois Constitution and statutes relating to bank stockholders' liability referred to by petitioner, were not involved therein and were not cited or considered by the court below. The decision was predicated upon established principles of contract law and not upon statutory provisions.

Statement—Corrections.

This was not a stockholders' liability suit. It was an action on a "Reinsurance Agreement" whereby the defendant, The Ohio National Life Insurance Company, reinsured the risks of the American Old Line Insurance Company (R. 36, 638). To effect such reinsurance, respondent took over certain assets of the American Old Line and assumed its insurance contracts and liabilities (R. 36, 435-

445, 642). Said Reinsurance Agreement was predicated upon a warranty of the accuracy of the books and records of the American Old Line (R. 37).

More than eleven years after the Reinsurance Agreement was executed, petitioners filed this suit, contending that by said Reinsurance Agreement respondent had assumed an alleged liability of the American Old Line as a stockholder of the Roseland Bank, and that, as creditors of said bank, petitioners could sue on said Reinsurance Agreement (R. 2-44).

The defenses were that petitioners were not third party beneficiaries under said contract, that the alleged stockholders' liability had not been assumed by respondent, and that petitioners were barred by laches and a breach of said warranty as to the accuracy of the books and records upon which the Reinsurance Agreement was premised (R. 44-57). At the trial, a fifth defense arose because petitioners failed to adduce competent proof of their alleged claims (R. 608).

The Master, trial court, and Circuit Court of Appeals all concurred in finding that (1) petitioners are not third party beneficiaries and cannot sue on the Reinsurance Agreement, and (2) that the alleged stockholders' liability was not assumed (R. 605-613, 622, 638-646). The trial court further held that petitioners were barred by a breach of said warranty (R. 622). The remaining defenses were not passed upon.

No Grounds Exist for Allowance of Certiorari Herein.

Petitioners advance two arguments for granting a writ of certiorari herein, (1) that the court below has decided a question of federal law in conflict with the decisions of other Circuit Courts of Appeals, and (2) that said court decided a question of local law in conflict with State Court decisions. Neither of these contentions is factually sound.

I.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUIT COURTS OF APPEALS.

A. The court below followed established practice in reviewing questions of fact herein.

The question of federal law, about which petitioners contend a conflict exists, involves the extent to which a record will be examined by a Circuit Court of Appeals in reviewing findings of fact (Pet. 7-8).

Petitioners claim that in reviewing findings of fact, the Circuit Court of Appeals herein limited its examination of the record to determining whether such findings had "*any rational* basis to support them", and thereby adopted a practice in conflict with the decisions of other Circuit Courts of Appeals. In doing so, petitioners focus attention upon the words "any rational basis" and place thereon a wholly unwarranted emphasis and construction.

When the *entire* opinion is examined (rather than an isolated phrase wrenched from its context), it is clear that the court below meant only to express and apply the rule that concurrent findings of fact by a Master and trial court will not be disturbed unless "clearly erroneous" or "plainly without support". *General Talk. Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14. Thus, when the court came "to a consideration of the facts" (R. 641), it carefully examined the testimony of all witnesses, and documentary evidence, and concluded that the concurrent findings of the Master and trial court had "*ample support* in the record and must be accepted." (R. 641-646.)

The same rule has been expressed in similar—although

slightly different—language and has been uniformly followed by other Circuit Courts of Appeals. *Fruehauf Trailer Co.* v. *Bridge,* 84 F. (2d) 660, 663 (C. C. A. 6th); *The Tourist No. 2,* 64 F. (2d) 669 (C. C. A. 9th); *Stewart* v. *Wall,* 87 F. (2d) 598, 599 (C. C. A. 4th); *Levin Bros.* v. *Davis Mfg. Co.,* 72 F. (2d) 163, 165 (C. C. A. 8th); *Seeley* v. *Hunt,* 109 F. (2d) 595, 596 (C. C. A. 5th); *Continental Corp.* v. *National Union Radio Corp.,* 67 F. (2d) 938, 943 (C. C. A. 7th); *Zimmerman* v. *Daley,* 61 F. (2d) 518, 519 (C. C. A. 1st); *Miller* v. *United States,* 57 F. (2d) 987, 990 (C. C. A. 10th).

There is no inconsistency between the action of the trial court below in reviewing findings and the action of the court in the cases cited by petitioners. Even petitioners' citations do not employ identical phraseology in expressing the rule to be applied, and not all of them involve findings which have been concurred in by both the Master and the trial court. There is no conflict, sufficient to sustain certiorari, between the phraseology employed by the court below and the language of other Circuit Courts of Appeals, in describing the same rule.

Regardless of the varying expressions used in describing that rule, Circuit Courts of Appeals have uniformly refused to disturb the concurrent findings of a Master and trial court, unless the record shows the same to be clearly erroneous. That this is the rule followed by the court below is clear from its consideration of the oral and documentary evidence, and from its conclusion that the findings have "ample support" in the record (R. 646).

B. Certiorari will not be granted to review evidence.

It is obvious from the above and from petitioners' extended discussion of facts (Pet. 11-14), that they are in reality asking this court to review the evidence and to

afford them another hearing on the correctness of the result reached in the trial court. It is well settled that this court will not grant certiorari for such purpose. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 509; *General Talk. Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178.

The classical statement of this rule is to be found in *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163, where Chief Justice Taft said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. **The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.** Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (Bold face type ours.)

Because we do not believe that a minute examination of the evidence is relevant to consideration of whether a writ should issue herein, we omit reference to petitioners' arguments on the facts (Pet. 11-14). The opinion of the court contains a full discussion of the facts and evidence amply supporting the findings of the Master and trial court. If such matters are germane herein—which respondent denies—reference is made to the appendix attached hereto.

II.

NO IMPORTANT QUESTION OF LOCAL LAW WAS DECIDED CONTRARY TO APPLICABLE DECISIONS OF ILLINOIS COURTS.

A. The question of local law is not an important one.

Rule 38 (5) (b) of this court requires that the local question be an "important" one. Importance is therefore an essential element for the exercise of jurisdiction of this court on certiorari. *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163; 11 Cyc. of Federal Procedure (2nd ed.) 51, § 5414.

The contract sued upon was a "Reinsurance Agreement" between two life insurance companies for the purpose of effecting reinsurance of the policies of the American Old Line (R. 36). The question of whether that contract was made for the direct benefit of petitioners, so that they might sue thereon as third party beneficiaries, is not sufficiently important to warrant the issuance of a writ herein.

That question is important only to the parties litigant. It relates to and affects only their private rights. It involves no public rights or interests. No principles of universal application are involved and the question is not of a recurring nature. This court has not previously recognized a decision on such a question to be grounds for granting certiorari.

B. The decision on local law is not in conflict with decisions of Illinois courts.

In denying petitioners' right to sue as third party beneficiaries under the contract here involved, the Master and courts below carefully examined and cited applicable

State Court decisions. They relied upon and quoted from the leading Illinois case of *Carson, Pirie, Scott & Co.* v. *Parrett,* 346 Ill. 252, 257, cited by petitioners (Pet. 15), which holds that the right of a third person not a party to a contract to sue thereon depends upon whether the contract was "made for his direct benefit" or whether the benefit to said person is merely "incidental" (R. 640). Illinois courts recognize the right to sue in the first situation and deny it in the second.

The Master and trial judge, both of whom long served as judges of the State Court before appointment to the Federal Judiciary, found as a fact that the Reinsurance Agreement was not made for the direct benefit of petitioners and that any benefit which might accrue thereunder was purely incidental (R. 609-11, 622). These findings are amply supported by the evidence. In affirming this finding, the Circuit Court of Appeals cited numerous Illinois cases (R. 640-41) and quoted from its own decision in *Vilter Mfg. Co.* v. *Loring,* 136 F. (2d) 466, in which the Illinois law relating to the right of a person—not a party to a contract—to sue thereon was exhaustively examined. From those authorities, the court correctly concluded that under the Illinois law the test of whether a third person may sue on a contract depends upon whether the contract was made for the direct or primary benefit of the third person (641).

The court below also cited *Kilburg* v. *Petrolagar Laboratories,* 280 Ill. App. 527, which involved the precise legal point which petitioners seek to review herein. The contract in that case contained defendant's unqualified promise "to pay all bills and invoices for labor and materials, as contracted, as and when the same become due and payable". Nevertheless, the Illinois court denied recovery to the materialmen on the ground that the contract was

not made for their benefit and that any benefit to them was "merely incidental". The decision in that case conforms to the decisions of both lower courts herein.

The *Novosk* case (323 Ill. App. 544), cited by petitioners, merely holds that a third party beneficiary need not be named in the contract *provided* "he is otherwise sufficiently described or designated". Obviously that case has no application in a situation where, as here, plaintiffs were not named, described, or designated in any manner by the Reinsurance Agreement.

Since respondent was never the owner of bank stock, the irrelevance of petitioners' reference to back stockholders' liability is apparent (Pet. 14-15). No question of the liability of the American Old Line as a bank stockholder was presented on the appeal and that liability was not considered or passed upon by the courts below.

The Circuit Court of Appeals correctly cited and followed applicable Illinois decisions on the question of petitioners' right to sue as a third party and there is no conflict between that decision and the applicable decisions of Illinois courts on this point.

The jurisdiction of this court on certiorari is exercised sparingly and only in cases of particular gravity and general importance, or in order to secure uniformity of decisions. *Hamilton Brown Shoe Co.* v. *Wolf*, 240 U. S. 251, 258; *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163.

This case does not present such gravity, importance or conflict of decisions as to justify this court in assuming jurisdiction herein. The writ should be denied.

Respectfully submitted,

KARL EDWIN SEYFARTH,
Counsel for Respondent.

Appendix.

The following facts are established by the record herein:

The contract sued upon herein is a "Reinsurance Agreement" between two life insurance companies designated as "Insurer" and "Re-insurer" for the stated purpose of effecting reinsurance of policies (R. 36). Its terminology throughout is that of *reinsurance* (R. 36-38). It expressly gives policyholders the right of direct suit against defendant (Par. 7). Insurance officials of Ohio and Illinois found that it conserved the rights of policyholders (R. 532-4). It was intended for the primary benefit of life insurance policyholders, and its object was the reinsurance of such policies (R. 609, 641-3).

Plaintiffs were depositors of the Roseland State Savings Bank (R. 3) and no claim is made that they were policyholders of the American Old Line. They were not parties to the Reinsurance Agreement, and neither they nor the alleged stockholders' liability of the American Old Line was referred to therein. Unlike policyholders, they were not given any direct action against defendant, and were not referred to in the approvals by the insurance departments of Ohio and Illinois.

That no one other than policyholders was intended to be benefited or to have a right to sue on the Reinsurance Agreement appears from the contract itself and the undisputed testimony of the negotiating agents of both parties to the agreement (R. 641-3). The Reinsurance Agreement was negotiated by Harold W. Kingery, President of the American Old Line Insurance Company, and by John H. Evans, actuary of The Ohio National Life Insurance Company (R. 229, 283, 321).

At the outset of the negotiations, Kingery told Evans that he wanted to sell the American Old Line or the stock thereof, but Evans said that he was not interested in that kind of a deal, but that he would consider entering into a *reinsurance* contract (R. 321-3, 229, 226). Kingery explained that the American Old Line would not be interested in selling its bank stocks, because they were considered to be very valuable, and because the stockholders of the American Old Line had borrowed from the banks involved and desired to retain the bank stock to protect their personal transactions (R. 321-2, 332, 230-1). That decision presented no difficulty, as the defendant could not legally acquire bank stocks (R. 230-1; Ohio Gen. Code, §§ 9357, 9358).

Since the American Old Line was to retain the bank stocks, Evans was not interested therein, paid no attention thereto, and made no investigation thereof (R. 231, 289, 291, 296). The attitude of Kingery was the same (R. 232-25). While Evans knew that the American Old Line owned some bank stock, he did not know what banks were involved and never heard of the Roseland Bank (R. 291, 289, 297).

The subject of stockholders' liability was not discussed or considered in those negotiations. Neither Evans nor Kingery knew of the existence of any such liability, and the subject never entered their minds (R. 249, 323-24, 289). Kingery testified that it was his understanding of the transaction and the Reinsurance Agreement that the defendant would not assume any stockholders' liability, and that if such a liability existed, it remained a liability of the American Old Line (R. 324-5, 331). This testimony was uncontradicted and shows a clear intention of the contracting parties that the defendant was not to assume payment of the claims asserted by plaintiffs herein.

That the subject of stockholders' liability of the American Old Line to plaintiffs was not considered by the parties is further indicated by the fact that, at that time, the Roseland State Savings Bank was open and paying dividends to its stockholders (R. 582). At that time the accounts of several of the plaintiffs had not yet been opened (R. 403-412) and the bank was paying all demands of its depositors (R. 11).

FILED
OCT 4
CHARLES ELMORE

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 346

MORRIS B. SACHS, T. C. WITT, GIZELLA WITT, ANNA CHRISTENSEN, PETER VISSER AND WILLIAM STERNBERG,

Petitioners,

vs.

THE OHIO NATIONAL LIFE INSURANCE COMPANY, A CORPORATION,

Respondent

REPLY TO BRIEF IN OPPOSITION

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Of Counsel.

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REPLY TO BRIEF IN OPPOSITION

Jurisdiction

The objection to the jurisdiction of this Court is captious. The order purporting to grant a 61-day extension instead of the 60 days authorized by the statute is not void, as were the orders in *Monks* v. *Lee,* 317 U. S. 590, and *Cresswell* v. *Tillinghast,* 286 U. S. 560, since in those cases jurisdiction of the Court had wholly expired at the time the order for extension or the order allowing the appeal was entered. Here it had not. In this case the order was entered June 19 (R. 652), although time would not have expired until June 21 (R. 647). Concededly, the order

was not effective to extend the time beyond the 60 days authorized by the statute—which would expire not August 21, 1945, the date recited in the order of extension, but August 20, 1945. The petition was filed on August 20, 1945, and is therefore timely. ROBERTSON & KIRKHAM, *Jurisdiction Sup. Ct. U. S.*, § 352, p. 719; § 383, p. 774; § 386, p. 776. The petition for extension of time prayed (p. 5)—

> "that this Honorable Court may enter an order extending the time for filing of the petition for certiorari sixty (60) days from the 21st day of June, A. D. 1945."

The order of Mr. Justice Murphy was manifestly intended to allow this 60-day extension. He had jurisdiction to grant a 60-day extension. The petition was filed within the 60 days thus allowed.

Scope of Review of Questions of Fact

Respondent attempts to explain away the ruling of the court below that it must accept the findings of the district court if there is "*any rational* basis to support them" on the ground that the court below really did not mean to announce such a rule, but instead actually reviewed the facts and found that the findings had "*ample support*" in the record and must be accepted.

(a) The opinion of the court below plainly must be read as announcing the any-rational-basis rule; and that is the only rule which the editor of the Federal Reports has been able to extract from the case on this point. Syllabus No. 3 of the report of this case, 148 F. 2d 128, reads:

> "Where record affords a rational basis in supporting findings of master and District Court, Circuit Court of Appeals must accept such findings."

The profession will, therefore, regard this case as establishing the rule.

(b) The "ample support" of which the court below speaks is ample support for the findings according to the any-rational-basis rule by which it announced it was measuring the case. In order for the support for findings to be "ample," it would have to be ample according to some standard or rule; and here it was held ample not in accordance with the rule in equity and under Rule 52 of the Rules of Civil Procedure, but ample to show "any rational basis" for the findings. Even if there could be an "ample support" rule, then it would follow not that there is no conflict, but that the court below has engrafted a new "ample support" rule upon the law relating to the scope of appellate review. Therefore, if respondent is right, there is further conflict with the cases cited in the petition.

(c) Since the decision below, there are now three rules which have been applied to the review of the findings of a district court: (1) Rule 52 of the Federal Rules of Civil Procedure, providing findings shall not be set aside unless "clearly erroneous"; (2) the rule that findings shall not be set aside if supported by "substantial evidence"; and (3) now, for the first time in our legal history, the rule that they shall not be set aside if there be "any rational basis" to support them.

These three rules are of ascending difficulty for an appellant to meet. It has recently been shown, STERN, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis* (1944), 58 Harv. L. Rev. 70, 79, 80-89, that it is possible for there to be substantial evidence to support a finding and yet for an appellate court to hold, consistently with the new Rule 52, that it is "clearly erroneous." Even less than substantial evidence would serve to provide a "rational basis" for sustaining a finding—e.g., the present case, where under the usual rules as to varying a written contract by parol, there was no

competent (let alone any substantial) evidence to support the finding, and yet the court below rationalizes a basis for upholding the findings of the district court. STERN, *op. cit.*, shows that the intention of this Court in the adoption of the "clearly erroneous" provision in Rule 52 was to allow broader review of facts, rather than the more narrow review accorded under the "substantial evidence" rule. The court below has, however, constricted review within even narrower limits. Its judgment ought to be reversed.

Further Conflict With Local Law

Respondent asserts (Brf. Opp., p. 4) that the court below "carefully examined the testimony of all witnesses, and documentary evidence." This is inaccurate. We have not burdened the Court with a review of the evidence; but it is worthy of note that neither the court below nor respondent in its statement and appendix have noted or considered the testimony of Harold A. Reise (R. 343-370) showing that the only logical basis for the allowance on the books of American Old Line Life Insurance Company of $173,846.54 for "Contingency Reserve" was to cover the superadded liability on the bank stock in question in this suit. Respondent has persistently urged that the books of American Old Line were used as the basis for the purchase of its assets and assumption of its liabilities, and stresses that American Old Line warranted the accuracy of the books and records (p. 3, p. 12). But from those books it is shown that a deduction from the assets of the company had already been made to provide for this very liability if it should ripen. Below, respondent's answer was that "contingency reserve" was of uncertain meaning, and did not imply a deduction from the assets of the company—so that it was not accurate to say that respondent was already compensated for the whole amount

of the contingent liability which it assumed in the "Re-insurance Agreement." This argument, however, flies in the face of a recent decision of the Illinois courts. The Appellate Court of Illinois has, since the opinion below, itself authoritatively defined the "contingency reserve" under the laws governing insurance in that state as being a "safety fund"—not a part of the legal reserve or the divisible surplus (for dividends), but a sum to cover extraordinary hazards of the insurance business. *Lubin* v. *Equitable L. Assur. Soc.* (1945), 61 N. E. 2d 753, 755. That case establishes further error in the judgment below, and further establishes that the court below has failed and refused to review the case on the basis of the meaning of the contract under the law of Illinois.

Respectfully submitted,

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